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Supreme Court, U.S.
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MAR 24 1998
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-1144

UNITED STATES OF AMERICA,

PETITIONER,

- VS -

NORMAN LEE OOLEY, JR.,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Title 18, United States Code § 3006A(d)(6) and Rule 39 of this Court, Petitioner, Norman Lee Ooley, Jr., asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed *in forma pauperis*.

Petitioner was represented by counsel appointed pursuant to Title 18, United States Code § 3006(a) in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: March 24, 1998

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(619)232-9700

Attorneys for Respondent

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No. 97-1144

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

- vs -

NORMAN LEE OOLEY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court deny review of an issue that Petitioner did not present to the Court of Appeals and which the Court of Appeals did not address?

2. Should this Court deny review of the holding of the Court of Appeals for the Ninth Circuit when it concluded that the validity of a search by state law enforcement officers, the fruits of which were used in a federal prosecution, is ultimately a question of federal law?

3. Should this Court refuse to hold the petition pending disposition of PENNSYLVANIA BOARD OF PROBATION AND PAROLE v. SCOTT, NO. 97-581, because Petitioner has failed to show any grounds of entitled relief to justify holding the petition when the questions presented in Scott are not instantly dispositive of the issues herein presented?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

- vs -

NORMAN LEE OOLEY, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Counsel for Respondent Ooley hereby files this brief in opposition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Court of Appeals opinion is reported at 116 F.3d 370.

JURISDICTION

The judgment of the Court of Appeals is entered on June 25, 1997; petition for rehearing was denied on September 11, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On June 14, 1995, at approximately 4:06 a.m., an officer from the Escondido Police Department observed that the front door to the Escondido Market was open. As the officer began to investigate, he observed Mr. Ooley coming from the parking area, and despite being ordered to stop, he left the scene in a truck. The license plate number was broadcast to other officers and, approximately seven minutes later, the truck and Mr. Ooley were located. Mr. Ooley was detained, arrested, and questioned.

At approximately 9:10 a.m., several officers from the Escondido Police Department, went to Mr. Ooley's residence, and conducted a warrantless search of his residence, while Mr. Ooley was still detained. Mr. Ooley had probationary search conditions.[1] His probation officer neither participated, nor was present, during the search. The police recovered a revolver and five rounds of ammunition within the residence.

Mr. Ooley was subsequently charged in a federal indictment with violations of 18 U.S.C. §§ 922(g)(1) and 924(a), felon in possession of a firearm and ammunition. He conditionally

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[1] On December 29, 1994, Mr. Ooley accepted a grant of probation following his conviction for second degree burglary. As a condition of probation, Mr. Ooley agreed to "[s]ubmit [his] person, property, place or residence, vehicle, personal effects to search at any time with or without a warrant, and with or without reasonable cause, when required by the [probation officer] or other law enforcement officer."

pled guilty, pursuant to Fed. R. Crim. P. 11(a)(2), specifically reserving the right to appeal the district court's order denying the motion to suppress evidence.

The basis of that appeal was whether the district court erred in ruling that the validity of a search by state law enforcement officers, the fruits of which were used in a federal prosecution, is determined solely by state law.

The Court of Appeals vacated the district court's decision, ruling that the validity of a search conducted by state law enforcement officers is ultimately a question of federal law. Thus, the Court of Appeals remanded the case for further proceedings. United States v. Ooley, 116 F.3d 370 (9th Cir. 1997).

REASONS FOR DENYING THE WRIT

I.

PETITIONER NEVER PRESENTED TO THE NINTH CIRCUIT THE QUESTION WHETHER RESPONDENT VALIDLY CONSENTED TO SEARCH OF HIS RESIDENCE.

Petitioner contends that the question presented for review is whether Respondent validly consented to a search of his residence when he agreed to a term of probation that authorized any law enforcement officer to search Respondent or his home. The framework for the analysis of the validity of a consent to search has been established by Schneckloth v. Bustamonte, 412 U.S. 218 (1973). This Court observed that the question is one of whether there is an "essentially free and unrestrained choice." Schneckloth, 412 U.S. at 225.

Here, the parties never presented the issue of the validity of Respondent's consent. Thus, neither the district court, nor the Ninth Circuit, was given an opportunity to make a determination pursuant to the Schneckloth voluntariness test.

This Court has stated that ordinarily it will not consider claims that were neither raised before or considered by the court of appeals. Adickes v. S.H. Kress and Co., 398 U.S. 144, 147 n.2 (1970). The issue of whether Respondent "validly consented" to a search of his residence when he agreed to a term of probation that authorized any law enforcement officer to search Respondent or his home is not contained in the record for this Court to review. This Court should therefore decline Petitioner's invitation for this Court to consider review of this case.

II.

THIS COURT SHOULD DENY REVIEW OF THE NINTH CIRCUIT OPINION BECAUSE THERE IS NO DISPUTE REGARDING THE ULTIMATE ISSUE: WHETHER THE VALIDITY OF A SEARCH CONDUCTED BY STATE LAW ENFORCEMENT OFFICERS IS ULTIMATELY A QUESTION OF FEDERAL LAW.

The fundamental issue raised in the court of appeals was whether the district court erred in applying solely state law, ignoring federal precedent, in analyzing the validity of a search by state law enforcement officers, the fruits of which were used in a federal prosecution. The government argued in the Ninth Circuit that "[Respondent] is simply wrong when he presents the notion that federal standards are to be used to judge the validity of a California law enforcement officer's search of a California

probationer who has agreed to a Fourth Waiver." Gov't C.A. Br. 20.

However, the Ninth Circuit agreed with Respondent in that "[w]hile federal courts must look to state law to determine the validity of the underlying probation condition itself . . . and may consider state precedent for its persuasive value, . . .the validity of a search conducted by state law enforcement officers is ultimately a question of federal law." United States v. Ooley, 116 F.3d 370, 372 (9th Cir. 1997), citing United States v. Davis, 932 F.2d 752, 758 (9th Cir. 1991).

There can be no dispute that the law is clear regarding this fundamental issue: federal law governs the admissibility of evidence in federal court, even if that evidence was gathered by state officials. United States v. Conway, 122 F.3d 841, 843-44 (9th Cir. 1997) (Wallace, J., concurring), petition for cert. denied, 118 S.Ct. 730 (Jan. 12, 1998). Here, despite Petitioner's efforts to re-draft the government's argument to the Court of Appeals, the Petitioner concedes, as it must, that "it is clear that federal law should control the ultimate validity of the search." Pet. 3, n.2. Therefore, review of this case is unnecessary; accordingly, this Court should deny the petition.

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III.

THIS COURT SHOULD NOT HOLD THE PETITION PENDING DISPOSITION OF PENNSYLVANIA BOARD OF PROBATION AND PAROLE v. SCOTT, NO. 97-581, BECAUSE PETITIONER HAS FAILED TO SHOW ANY GROUNDS OF ENTITLED RELIEF TO JUSTIFY HOLDING THE PETITION WHEN SCOTT'S ISSUE WOULD NOT BE INSTANTLY DISPOSITIVE.

Petitioner suggests that the petition be held pending this Court's decision in Pennsylvania Board of Probation and Parole v. Scott, No. 97-581, and disposed of as appropriate in light of that decision. Pet. 5. However, the issues that this Court has invited the parties to brief in Scott are not relevant to the decision of the Court of Appeals below.

The first question presented in Scott is whether a search of a parolee's residence must be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to the searches as a condition of his parole. Here, Petitioner, without further explanation, states that "[i]f this Court concludes that reasonable suspicion is not required to justify a consent search in such a case, its decision will very likely be dispositive of the validity of the search here." Pet. 5. However, whether reasonable suspicion was so required has no impact on the ultimate question below of whether federal law governs the admissibility of evidence in federal court.

Moreover, a "reasonable suspicion" analysis is not dispositive here because it is independent of the **purpose** of the search performed (i.e. whether the search was a probation search). In Ooley, the "reasonable suspicion" issue was neither raised,

argued, briefed, or even contested in any court. Thus, the "reasonable suspicion" issue is independent of the issues and analysis of the Court of Appeals opinion.

Petitioner contends that "if the Fourth Waiver constitutes a valid consent to search, there would be no basis for suppressing the evidence obtained by the police in this case, regardless of whether the search is characterized as a `probation search' or an `investigative search.'" Pet. 5. This contention suggests that a valid Fourth Waiver would sanction any search, whether its purpose is for legitimate probationary purposes or not, including searches conducted for simply harassment purposes. Petitioner's contention cannot stand as it begs the question. To be legitimate, a search in a Fourth Waiver context must be for probationary purposes, independent of whether reasonable suspicion existed for the probationary search.

The parties in Scott recognize that, at the very least, citizens with Fourth Waivers should be entitled to expect that searches of their residences and person are reasonably related to the legitimate penological objectives of supervision. Brief for Pennsylvania Board of Probation and Parole at 24. Accord Griffin v. Wisconsin, 483 U.S. 868, 876-77 (1987) (upholding reasonable state regulation governing searches of probationers' homes satisfies Fourth Amendment).

In Ooley, the Court of Appeals simply re-affirms this notion, stating that it has been "long recognized that the legality of a warrantless search depends on a showing that the search was a

true probation search and not an investigative search" (i.e. non-probationary search). Ooley, 116 F.3d at 372.[4]

The second question presented in Scott is whether the exclusionary rule applies to parole revocation proceedings. This question has nothing whatsoever to do with Ooley. Scott involved a parole revocation proceeding in Pennsylvania, which was not part of a criminal prosecution. No police were involved, and no criminal charges were brought against Scott, in stark contrast to Respondent Ooley. The instant case involves a criminal proceeding, in which the fruits of a search by police officers provided the basis for criminal charges brought against Respondent.

Because neither question presented in Scott is instantly dispositive, Petitioner has failed to show any grounds why the petition should be held pending disposition in Scott. Therefore, the petition should not be so held.

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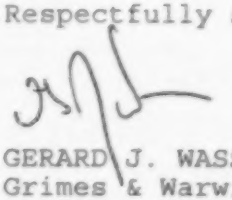
[4]Moreover, Ooley is further distinguishable from Scott because the record in Scott suggests that the search of Scott's residence was related to legitimate parole objectives. The parole agents had received information that Scott had violated parole by using weapons, and they went to his home with the purpose of attempting to locate the weapons; and they knew they were looking specifically for the weapons. However, in Ooley, the record is devoid of any such facts. Thus, the Court of Appeals correctly remanded for an evidentiary hearing.

CONCLUSION

Petitioner has failed to state any reason for this Court to grant review of the opinion of the United States Court of Appeals for the Ninth Circuit. Accordingly, this Court should therefore deny the petition.

Respectfully submitted,



Dated: March 24, 1998

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Telephone: (619) 232-9700

Attorneys for Respondent

CERTIFICATE OF RELATED CASES

Counsel for Mr. Ooley is not aware of any cases before this Court related to this appeal.

Respectfully submitted,

Dated: March 24, 1998

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No. 97-1144

UNITED STATES OF AMERICA,

PETITIONER,

- VS -

NORMAN LEE OOLEY, JR.,

RESPONDENT.

PROOF OF SERVICE

State of California,)
) ss.
County of San Diego,)

GERARD J. WASSON, being counsel of record, deposes and says:

That on 24 March 1998, the brief in opposition to petition for writ of certiorari in the above-entitled case was deposited in a United States Post Office mail box located in San Diego, California, with first-class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States and within the time allotted for filing said petition for writ of certiorari;

That an additional copy of the petition and motion to proceed in forma pauperis were served on counsel for respondent:

Seth P. Waxman, Solicitor General of the United States
Sidney M. Glazer, Attorney
Department of Justice
Washington, D.C. 20530-0001

Dated at San Diego, California, this 24th Day of March, 1998.

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